Paper No. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RAINER SCHLICHT,
HANS ROCHLING and
KONRAD ALBRECHT

Appeal No. 93-3770
Application 07/496,273[1]

HEARD: December 7, 1995

Before KIMLIN, JOHN D. SMITH and TURNER, *Administrative Patent Judges*.

JOHN D. SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 1-20.

This appealed subject matter is illustrated by claims 1 and 15 which read as follows:

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[1] Application for patent filed March 20, 1990.

1. A process for the preparation of water-dispersible granules from an aqueous dispersion or solution of solids, which comprises spraying the aqueous dispersion or solution by the counter-current principle into the gas stream of a fluidizing chamber and causing it to fluidize, starting the formation of granules in a start-up phase at 10 to 60% of the maximum gas flow and at only up to 30% of the maximum feed rate of dispersion or solution, and subsequently increasing the feed rate and the gas flow up to the maximum values for the feed rate and the gas flow, and, in the main phase, continuing the formation of granules at maximum gas flow and maximum feed rate.

15. Water-dispersible granules which have been prepared by a process as claimed in claim 1.

The subject matter on appeal relates to a process for the preparation of water-dispersible granules useful as pesticides. The process comprises spraying an aqueous dispersion or solution of solids (i.e., the active compound) downwardly into a fluidizing chamber in a counter-current relationship to an up-flowing gas stream in the chamber thus causing the dispersion or solution to fluidize and initiate the formation of granules. During this start-up phase, gas flow rate is limited to 10 to 60% of the maximum gas flow rate and the aqueous dispersion or solution feed rate is limited to up to 30% of its maximum feed rate. The gas flow rate and liquid feed rate are subsequently increased to each's respective maximum during a main phase wherein the formation of granules is continued.

In contrast, prior art granule forming processes require the initial formation of a powder of the active compound (e.g. by drying a dispersion of the compound in a separate spray tower or

by dry grinding a mixture of the active compound with a formulating agent) which powder is initially charged to a fluidized bed granulation plant, fluidized therein and sprayed with an adhesive solution to produce granules. See the specification, page 3.

The references relied upon by the examiner as evidence of obviousness are:

Bean et al. (Bean)	3,748,103	July 24, 1973
Lykov et al. (Lykov)	3,849,233	Nov. 19, 1974
Bertsch-Frank et al. (Bertsch-Frank)	4,968,500	Nov. 06, 1990

All of the claims on appeal are rejected under 35 U.S.C. § 103 as being unpatentable over Lykov in view of Bertsch-Frank and Bean.

We reverse the rejection of process claims 1-14 and 16-20. We affirm the rejection of product-by-process claim 15.

The examiner argues that Lykov teaches a fluidized bed production of water-dispersible granules from solutions or suspensions. The examiner states that from the teachings of Bertsch-Frank one of ordinary skill in the art would have found it obvious to modify the various flow rate parameters so as to optimize product quality. The examiner cites the Bean reference to provide additional dust catching and granule sizing steps recited in unspecified dependent claims.

The examiner recognizes however that none of the references addresses the parameters of gas flow rates and liquid feed rates

of a start-up phase[2]. The examiner also apparently recognizes (Answer, page 4) that the references do not suggest the absence of seed granules (powder) during the start-up phase of appellants' process. The examiner nevertheless concludes that the claimed subject matter would have been obvious to one of ordinary skill in the art because as stated in the Answer at page 4,

> it would seem that the optimization which applicant(sic, applicants) is demonstrating is equivalent to that accomplished by the references but merely characterized by different terminology.

The above statement, however, is simply an unsupported opinion of the examiner.

By now it is well settled that the examiner has the initial burden of establishing, not by unsupported conjecture, but by objective evidence or by sound scientific reasoning a *prima facie* case of obviousness. Compare *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

To support the conclusion that a claimed process is directed to obvious subject matter, the references must either expressly or impliedly suggest the claimed invention or the examiner must provide a convincing line of reasoning as to why the skilled artisan would have found the claimed invention to have been

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[2]Indeed, it is not apparent that the processes described in the relied upon references even involve two-phase processes.

obvious in light of the prior art teachings. See *Ex parte Clapp*, 227 USPQ2d 972 (Bd. Pat. App. & Int. 1985); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir. 1988). Here, the examiner has failed to meet his burden.

We therefore disagree with the examiner's conclusion that the subject matter of claims 1-14 and 16-20 would have been obvious over Lykov in view of Bertsch-Frank and Bean. Accordingly, we reverse the rejection as to these claims.

We, however, agree with the examiner's decision to reject appealed product claim 15. This product-by-process claim defines a granule product that appears to be identical to, or only slightly different from the granules of the prior art[3], *In re Marosi*, 710 F.2d 799, 803, 218 USPQ 289, 292-3 (Fed. Cir. 1983). Appellants have provided no objective evidence demonstrating that the claimed product contains features not possessed by the prior art granules.

The decision of the examiner to reject claims 1-14 and 16-20 is reversed. His decision to reject claim 15 is affirmed.

[3]See the specification, page 3 and this decision at page 2.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR 1.136(a).

AFFIRMED-IN-PART

EDWARD C. KIMLIN
Administrative Patent Judge

JOHN D. SMITH
Administrative Patent Judge

VINCENT TURNER
Administrative Patent Judge

BOARD OF PATENT APPEALS AND INTERFERENCES

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